

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 13**

PARROTKEAT ENTERPRISES, INC.,  
D/B/A BG ELECTRONICS

Employer

and

13-RC-21403

INTERNATIONAL BROTHERHOOD OF  
ELECTRICAL WORKERS, AFL-CIO, LOCAL 134

Petitioner

**DECISION AND DIRECTION OF ELECTION**

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, as amended, a hearing on this petition was held on October 27, 2005 before a hearing officer of the National Labor Relations Board, herein referred to as the Board, to determine whether it is appropriate to conduct an election in light of the issues raised by the parties.<sup>1</sup>

**I. Issues**

The sole issue in this case is whether Bryan Stacey, the Employer's director of technical services, is a supervisor within the meaning of the Act. The Employer asserts that Stacey possesses supervisory authority based on his purported ability to assign work and responsibly direct the work of others. The Employer also contends that Stacey has the authority to effectively recommend that employees be hired by the Employer. Certain secondary indicia, according to the Employer, also supports finding that Stacey is a supervisor under the Act. The Employer points to the fact that Stacey was, for a time, paid a salary, rather than by the hour, that he typically gets more hours than other workers, and for a brief period of time, he had an office at the Employer's facility.

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<sup>1</sup> Upon the entire record in this proceeding, the undersigned finds:

- a. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.
- b. The Employer is engaged in commerce within the meaning of the Act and it will effectuate the purposes of the Act to assert jurisdiction herein.
- c. The labor organization involved claims to represent certain employees of the Employer.
- d. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Sections 2(6) and (7) of the Act.

## **II. Decision**

I find that the Employer has failed to meet its burden of establishing that Bryan Stacey possesses sufficient authority to be deemed a supervisor pursuant to Section 2(11) of the Act, and, as he shares a community of interests with the other audio video installer-technicians, he is included in the petitioned for unit.

Accordingly, IT IS HEREBY ORDERED that an election be conducted under the direction of the Regional Director for Region 13 in the following bargaining unit:

All fulltime and regular part time audio video installers-technicians, including the director of technical services, employed by the Employer at its facility currently located at 625 Estes Avenue, Schaumburg, Illinois; but excluding all office clerical employees and guards, and professional employees and supervisors as defined by the Act.

## **III. Statement of Facts**

The Employer sells, installs, and services various types of electronic audio, visual, and communication equipment. Thomas Keating is the Employer's president and CEO. Keating purchased BG Electronics in about July 2005 and at that time, at least partially merged it with the business operation of one of Keating's minority partners. At the time the petition was filed, the Employer employed five employees, in addition to Keating. Two of these employees work in the Employer's office, located in Schaumburg, Illinois, including Janice Travis, who is Keating's administrative assistant. Neither party contends that the two employees that work in the office should be included in the unit. In addition to answering phones and performing various office functions, Travis is involved in tracking and scheduling work for the remaining three employees, all of whom generally perform their job functions at the customers' facilities. For example, Travis typically receives calls for service by the Employer's customers and must decide, based on such factors as who performed the original installation or service and the workers' availability, which employee will be sent to the customer.

The three field employees are Bryan Stacey, the Employer's director of technical services, and two audio-visual technicians ("AV techs"), Victor Tario and Joseph Myles. Stacey and the AV techs do installation and repair work for the Employer's customers. Stacey, unlike the AV techs, does occasional equipment repair at the Employer's office, and he also provides technical assistance to Keating if Keating needs assistance in formulating project estimates. Thus, according to Keating, on about half of the estimates he prepares, he consults with Stacey to determine the number of hours needed to perform the work in question.

Stacey has 29 years of experience doing installations and repairs on audio visual equipment, and prior to purchasing BG Electronics, Keating specifically sought out Stacey to work at the Employer, due to this extensive background in the field. While the exact number of years of experienced possessed by each AV techs is not in evidence, Keating testified that he considers Stacey to have the most seniority, then Tario and Myles, in that order. Because Keating has a policy that if there is not enough hours for all three employees in a given week the one with the least seniority receives the fewest hours, their relative seniority results in Stacey consistently getting more hours, if there is any lack of work.

To receive their work assignments, all three field employees either come to the office in the morning, or call in to Travis to find out where they will be working each day, doing either installations or service calls. Since the Employer took over operations of BG Electronics, however, it has discouraged the field employees, including Stacey, from coming in to the office since calling in is less time consuming, and therefore more efficient. When customers call for service during the day, Travis has access to their daily assignments, and can therefore make adjustments to their work assignments based on customer needs, if the situation warrants it.

Some differences originally existed between Stacey and the AV techs. For example, initially, Stacey was salaried and had use of a credit card for gas purchases, whereas the two AV techs were paid by the hour and were reimbursed for their mileage. In addition, during the transition period, while the Employer was merging BG Electronics with the business owned by Keating's partner, Stacey had an office at the Employer's Schaumburg facility. However, around the time the merger was completed, in late August or early September, Stacey was converted to being paid by the hour, began being reimbursed for his mileage like the AV techs, rather than having the credit card, and the Schaumburg facility was renovated such that Stacey's office was virtually eliminated. Accordingly, within a few months of the Employer's purchase of the predecessor company, these differences between Stacey and the AV techs no longer existed.

With respect to his ability to assign and responsibly direct work, there is some evidence that, at times, Stacey is consulted regarding which AV tech will be assigned to the larger, more complex jobs. Usually the more complex jobs require more than one worker, and when there are two or more employees working on the same job, which is apparently a relatively infrequent event, Stacey is typically one of the two, due to his experience. According to Keating, if it is a multi-person job, Stacey decides who will work with him on the job and who will perform which tasks at the jobsite. There is no evidence, however, regarding what factors Stacey considers when making either a work assignment (i.e. which AV tech will work with him) or when directing their work at the site by assigning the tasks each person will perform. In addition, in terms of directing the AV techs' work, Stacey is limited to following what is called for by the customer and the specific parameters of the job. There is no evidence, for example, that he has the authority to deviate from the job as proscribed by the relevant work order. According to Stacey, Travis makes most of the decisions regarding who goes out on multi-person jobs, and that he is often assigned to work with Tario in order to provide technical training to Tario.

The only evidence regarding Stacey's involvement in the Employer's hiring process deals with the hiring of Tario. Tario worked for BG Electronics for approximately 2 years before the Employer purchased that entity. In July 2005, Stacey interviewed Tario before he was offered a job with the Employer. Other than Stacey's testimony that he suggested that Tario be given a chance to "see how he works out" there was no testimony regarding when he made this statement relative to when the decision was made to hire Tario. Similarly, there is no evidence regarding what weight, if any, was given to Stacey's recommendation regarding Tario.

The evidence demonstrates that Stacey does not possess other authority indicative of supervisory status. For example, Stacey cannot discipline other employees. I do note that on

one occasion, Stacey did speak to Tario about a work quality issue. Specifically, after a customer had repeatedly called the Employer regarding how its equipment was functioning, despite Tario having been previously sent there on multiple service calls, Travis asked Stacey to go to the site to try to resolve the customer's complaints. Stacey was able to find the problem, which turned out to be unrelated to the work performed by the Employer. Nonetheless, Tario took pictures of the problem and thereafter discussed them with Tario. According to Tario, Stacey said he was doing it simply to make Tario a better employee. Moreover, Tario admitted that he understood that this incident would have no impact on his status as an employee. More importantly, the Employer has not argued that this amounted to discipline, or that Stacey engaged in any other conduct that could be characterized as discipline.

Similarly, Stacey does not have the authority to authorize overtime, and the evidence establishes that the AV techs typically call either Travis or Keating if they need to leave work earlier than expected. Although according to Keating, if he were on the same jobsite with an AV tech, Stacey could let an employee leave early, no examples were given, and there was no evidence presented regarding under what circumstance this may, or has, occurred.

#### **IV. Analysis**

Section 2(11) of the Act defines a supervisor as: any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

It is well settled that the Act therefore sets forth a three-part test for determining supervisory status. Individuals are statutory supervisors if (1) they hold the authority to engage in any one of the twelve listed supervisory functions; (2) their exercise of such authority requires "independent judgment" and is not merely routine or clerical, and (3) their authority is held "in the interest of the employer." See, *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 712 (2001). An individual need only exercise one of the functions enumerated in Section 2(11) to be found to be a supervisor. *Kentucky River Community Care*, supra; *Schnurmacher Nursing Home v. NLRB*, 214 F.3d 260, 264 (2d Cir. 2000); *Butler-Johnson Corp. v. NLRB*, 608 F.2d 1303, 1306 n.4 (9th Cir. 1979).

The burden of proving that an individual is a statutory supervisor rests with the party asserting it, and any lack of evidence is construed against that party. *Kentucky River Community Care*, supra. In addition, inferences and conclusory statements, without detailed specific evidence of independent judgment are insufficient and therefore fail to prove supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991). Moreover, an individual's status is determined by their duties, and not their title or classification. *Demco New York Corp.*, 337 NLRB 850, 855 (2002). Accordingly, it should be noted at the outset that Stacey's title is irrelevant to the determination at hand.

If the specified 2(11) criteria has not been conclusively established, or if it is a borderline case, secondary indicia of supervisory status may be considered. *Monarch Federal Savings & Loan*, 237 NLRB 844, 845 (1978). Nonetheless, it is well-established that secondary indicia of supervisory status, without more, does not suffice to establish that an individual is a supervisor. See, *J.C. Brock Corp.*, 314 NLRB 157, 159 (1994). Here, to the extent that any secondary indicia existed at one time, it is no longer the case. Thus, even assuming, arguendo, that this was a borderline case and that secondary indicia should therefore properly be considered, the fact that it no longer exists, and no claim has been made that that it will ever return, makes the secondary criteria, like Stacey's title, immaterial to the disposition of this case. As such, the fact that, unlike the AV techs, Stacey was once paid a salary, rather than by the hour, that he used to have a gas credit card, and that he used to have an office does not support a finding that Stacey is a statutory supervisor.

As to the statutory criteria listed above, there is no evidence that Stacey has any authority to transfer, suspend, lay off, recall, promote, discharge, reward, or discipline other employees, or to adjust their grievances, or to effectively recommend any of these actions. Rather, the Employer relies on its claim that Stacey has the authority to assign and responsibly direct employees, and that he can hire or effectively recommend that employees be hired to support its assertion that he is a supervisor under the Act.. However, I find that the Employer has failed to carry its burden of establishing Stacey is a supervisor based on those factors.

With respect to his authority to assign work, the most glaring deficiency is that fact that the Employer has not established that his involvement in the assignment process includes the use of independent judgment. Even assuming the record evidence in the light most favorable to the Employer that Stacey plays some role in determining which AV techs will work with him on certain jobs, there is simply no evidence to suggest that Stacey uses independent judgment in making this decision. No specific examples were given, and there is no evidence whether he considers, for example, the relative skills and abilities of the employees when making this determination, rather than merely considering routine factors, such as their availability at the time. Thus, it cannot be said that it has been established that Stacey uses independent judgment in this regard. Indeed, the evidence is clear that most of the time, the AV techs work independently on a job, and there is no basis in the record upon which to conclude that Stacey's selection of one over the other is based on anything beyond routine or clerical factors.

The same can be said regarding Stacey's authority to responsibly direct the AV techs. Stacey is clearly the most senior field employee, with nearly 30 years of experience. There is no evidence in the instant record to suggest that his responsibilities at jobs that involve more than one technician goes beyond the kind of routine, decision making authority typical on a non-supervisory leadman. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997). Rather, to the extent he directs the AV techs work, the evidence demonstrates that he is merely making sure that the work is done in an in a technically correct manner based on his superior experience, and he is at all times confined by the parameters established by customer's request. Accordingly, I find that there is insufficient evidence to establish that Stacey uses independent judgment in responsibly directing the work of other employees such that he should be deemed a supervisor.

The Employer has likewise failed to carry its burden with respect to establishing that Stacey either has the authority to hire employees, or that he has the authority to effectively recommend such action. As to the only evidence on this subject, pertaining to the interview of Tario, the Employer presented no evidence concerning what weight, if any, was given to Stacey's recommendation to hire Tario. Perhaps more importantly, it is not even clear that Stacey's suggestion to hire Tario was made before the decision to hire Tario was made. Rather, all that can be gleaned from the record is that before Tario was offered a job, Stacey interviewed him and discussed the quality of work that was expected. This evidence, however, does not establish when the decision to hire Tario was made, relative to Stacey's recommendation. Thus, it is unclear whether Stacey's recommendation was even considered at all, much less that it amounted to an effective recommendation to hire Tario. I therefore find that the Employer has not carried its burden of establishing that Stacey possesses sufficient supervisory authority in this regard.

In sum, the evidence does not warrant finding that Bryan Stacey is a statutory supervisor. Accordingly, as he shares a community of interests with the other AV techs I find that he should be included in the petitioned for unit.

#### **V. Direction of Election**

An election by secret ballot shall be conducted by the undersigned among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and Regulations. Eligible to vote are those in the unit who were employed during the payroll period ending immediately preceding the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their replacements are eligible to vote. Those in the military services of the United States may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated payroll period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have not been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced. Those eligible shall vote whether or not they desire to be represented for collective bargaining purposes by

#### **VI. Notices of Election**

Please be advised that the Board has adopted a rule requiring election notices to be posted by the Employer at least three working days prior to an election. If the Employer has not received the notice of election at least five working days prior to the election date, please contact the Board Agent assigned to the case or the election clerk.

A party shall be estopped from objecting to the non-posting of notices if it is responsible for the non-posting. An employer shall be deemed to have received copies of the election notices unless it notifies the Regional Office at least five working days prior to 12:01 a.m. of the day of the election that it has not received the notices. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure of the Employer to comply with these posting rules shall be grounds for setting aside the election whenever proper objections are filed.

## **VII. List of Voters**

To insure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *N.L.R.B. v. Wyman-Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is directed that 2 copies of an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of this Decision. *North Macon Health Care Facility*, 315 NLRB 359, fn. 17 (1994). The Regional Director shall make this list available to all parties to the election. In order to be timely filed, such list must be received in Region 13's Office, 209 South LaSalle Street, 9<sup>th</sup> Floor, Chicago, Illinois 60604, on or before **Friday, December 9, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor shall the filing of a request for review operate to stay the requirement here imposed. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

## **VIII. Right to Request Review**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street NW, Washington, DC 20005-3419. This request must be received by the Board in Washington by **Friday, December 16, 2005**.

DATED at Chicago, Illinois this 2<sup>nd</sup> day of December 2005.

/s/ **Roberto G. Chavarry**  
Regional Director  
National Labor Relations Board  
Region 13  
209 South LaSalle Street, 9<sup>th</sup> Floor  
Chicago, Illinois 60604

CATS – VelSE (Voter Eligibility – Statutory Exclusions)

177- 8501-4000; 177-8560-1000; 177-8560-1500; 177-8580-3500

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